IDI SDN BHD

v.

SHARMNI RAMIAH

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: P-04-94-2005]
22 SEPTEMBER 2008

CIVIL PROCEDURE: *Action - Striking out - Plaintiff's action against defendant's solicitors for negligence - No privity of contract - Whether action for negligence sustainable - Whether facts showed issue to be tried - Whether striking out of action proper*

LEGAL PROFESSION: *Duty of care - Negligence - Plaintiff's action against defendant's solicitors for negligence - No privity of contract - Whether action for negligence sustainable - Whether facts showed issue to be tried - Whether striking out of action proper*

This was the plaintiff's appeal against the order of the High Court striking out the plaintiff's statement of claim for want of cause of action. The plaintiff claimed against the defendant for breach of duty of care in negligence. The facts showed that the defendant was the solicitor for the vendor of a property in a sale and purchase agreement with the plaintiff. A draft agreement was settled between the vendor and the plaintiff containing a clause stipulating that the monies paid to the defendant were to be held by the defendant as stakeholder until the completion of the transaction. On 3 December 1991, the plaintiff's solicitors wrote to the defendant enclosing payment on the defendant's undertaking not to release the deposit sum to the vendor. Later on 5 December 1991 a letter from the plaintiff's solicitors confirmed an amendment to the draft agreement that removed the stakeholder's position. The sessions court dismissed the application by the defendant's solicitors to strike out the action but on appeal it was reversed by the High Court. Hence, the plaintiff's appeal.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) This was not a plain and obvious case in which the plaintiff was bound to fail. It was for the sessions court to ultimately determine whether a duty of care should be imposed in the circumstances of the case and equally determine whether there was a breach of the duty. It was significant to note that the defendant solicitors made no response to the letter of 3 December 1991. That itself warranted a trial of the action. Although there was no privity of contract between the plaintiff and the defendant solicitor, it was settled law that such privity was not needed between the parties concerned to sustain an action for negligence. (para 5)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan plaintif terhadap perintah Mahkamah Tinggi yang membatalkan penyata tuntutan plaintif atas alasan ketiadaan kausa tindakan. Plaintif menuntut terhadap defendan kerana kecuaian dan kerana melanggar kewajipan berjaga-jaga. Fakta menunjukkan defendan bertindak sebagai peguamcara kepada seorang penjual hartanah dalam satu perjanjian jual beli di antara penjual tersebut dengan plaintif. Berikutnya, satu deraf perjanjian telah dipersetujui di antara penjual dan plaintif yang mengandungi fasal yang menyatakan bahawa segala wang yang dibayar kepada defendan akan dipegang oleh defendan sebagai stakeholder sehinggalah transaksi disempurnakan. Pada 3 Disember 1991, peguamcara plaintif menulis kepada defendan dan mengemukakan bayaran atas akujanji defendan tidak melepaskan wang tersebut kepada penjual. Kemudian, pada 5 Disember 1991, peguamcara plaintif menulis pula surat mengesahkan pindaan kepada deraf perjanjian yang menghapuskan kedudukan stakeholder. Mahkamah sesyen menolak permohonan peguamcara defendan untuk membatalkan tindakan, tetapi atas rayuan keputusan tersebut diakas oleh Mahkamah Tinggi. Plaintif dengan itu merayu.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Ini bukan satu kes di mana plaintif jelas tidak boleh berjaya. Pada akhirnya, tanggungjawab mahkamah sesyen adalah menentukan sama ada kewajipan berjaga-jaga harus dikenakan

dalam halkeadaan kes ini, dan seterusnya sama ada berlaku pelanggaran terhadap kewajipan tersebut. Adalah penting untuk melihat bahawa peguamcara defendan tidak memberi sebarang tindakbalas terhadap surat bertarikh 3 Disember. Itu sahaja pun sudah memadai bagi menuntut tindakan dibicarakan. Dan walaupun tidak wujud priviti kontrak di antara plaintif dan peguamcara defendan, undang-undang mantapnya adalah bahawa priviti sedemikian tidak diperlukan oleh pihak-pihak terbabit bagi menyokong suatu tindakan kecuaian.

Case(s) referred to:
Smith v. Eric Bush [1990] 1 AC 831 ***(refd)***
Wenlock v. Moloney [1965] 2 All ER 87 ***(refd)***

For the plaintiff/appellant - Muhamad Yusof Puteh; M/s Tan Bak Lee & Co
For the defendant/respondent - Paramjit Singh; M/s R Sharmni, Siva Ramiah & Co

[Appeal from High Court, Pulau Pinang; Civil Trial No: 12-209-2003]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA delivering judgment:

[1] This is the judgment of the court.

[2] This is an appeal against the order of the High Court in Penang striking out the plaintiff's statement of claim for want of a cause of action. The defendant in this proceeding is a solicitor; the subject matter concerns the sale and purchase of real property. The substance of the plaintiff's claim is that the defendant is under a duty of care in the tort of negligence, had breached that duty in consequence of which the plaintiff had suffered damage.

[3] The relevant facts are that a draft agreement was settled between the vendor of the property in question and the plaintiff. It contained a clause which said that the monies paid to the solicitor (the defendant in the court below) were to be held by her as a stakeholder until the completion of the transaction. On 3 December 1991, the solicitors for the plaintiff wrote enclosing payment to the defendant on her undertaking not to release the deposit sum to her client, ie, the vendor. Later on 5 December

A 1991, a letter from the plaintiff's solicitors confirmed an amendment to the draft agreement which removed the stakeholder's position.

[4] The Sessions Court dismissed an application by the
B defendant's solicitors to strike out the action. High Court reversed it. The only issue before us is whether there is an issue to be tried in this case or whether – to borrow the words of Danckwerts LJ in *Wenlock v. Moloney* [1965] 2 All ER 87 "that the action could not succeed or was objectionable for some other reason."

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[5] In our judgment, this is not a plain and obvious case in which the plaintiff is bound to fail. We think that it is for the Sessions Court to ultimately determine whether a duty of care should be imposed in the circumstances of this case and equally
D determine whether there is a breach of the duty. It is significant and we emphasise this: the defendant solicitors made no response to the letter of 3 December. That in itself warrants a trial of this action. It is true that that there was no privity of contract between the plaintiff and the defendant solicitor. But it is settled
E law that there need be no privity of contract between a plaintiff and a defendant in order to sustain an action for negligence. See *Smith v. Eric Bush* [1990] 1 AC 831.

[6] For the reasons already given, this appeal must succeed. It is allowed. The orders of the High Court are set aside. The orders
F of the Sessions Court are restored. The summons and statement of claim are restored to file. The respondent must pay the costs of this appeal and those incurred in the courts below. The deposit shall be refunded to the appellant.

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